Supreme Court, U. S.
FILED
FEB 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1253

JOSEPH L. BECKERS and
DANIEL S. MIOTKE,

Petitioners,

vs.

INTERNATIONAL SNOWMOBILE INDUSTRY
ASSOCIATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	3
Question Presented	3
Subsidiary/Alternative Questions	4
Statutes and Rules Involved	4
Statement of the Case	6
Argument	7
Public Policy	19
Conclusion	21
Appendix	A-1
Circuit Court Opinion	A-1
Circuit Court Rehearing denial	A-6
District Court Orders	A-6-A-10
Letter from the Hoover Institution	A-13
Sales Slip	A-14

AUTHORITIES CITED

PAGE

Cases:

Albrecht v. The Herald Co., 390 U.S. 145 (1968) 8

Caribe Trailer Sys. v. Puerto Rico Maritime Shipping 1978-2 Trade Cases para. 62,133 (D. Col. 1978) 14

Chambers & Barber v. General Adjustment, 60 F.R.D. 455 (S.D.N.Y. 1975) 14

Conley v. Gibson, 355 U.S. 41 (1957) 18

Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 8

Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973) 10

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) 8

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1967) 16

Gas-A-Tron of Arizona v. American Oil Co., 1977-2 Trade Cases para. 61,789 (D.Ariz. 1977) 8

Hamilton v. Keystone Tankship Corp., 539 F. 2d 684 (9th Cir. 1976) 15

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 8, 22

Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976) 15

Illinois Brick v. State of Illinois, 431 U.S. 720 (1977) 2, 3, 4, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20, 21, 22

PAGE

In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation, 1978-1 Trade Cases par. 61,839 (C.D. Cal. 1978) 9

Parrish v. Bd. of Comrs. of Ala. St. Bar, 533 F. 2d 942 (5th Cir. 1976) 15

Pfizer v. Government of India, 54 L. Ed. 2d 563 (1978) 19

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 15

Reiter v. Sonotone Corporation, et al., No. 78-690, certiorari granted 1/8/79 ..2, 3, 19, 20, 21, 22

Sugar Industry Antitrust 1978- Trade Cases para. 61,394 (3rd Cir. 1978) 9

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 20

Willmar Poultry Co. v. Morton-Norwich, Inc. et al., 520 F. 2d 289 (1975) 12, 14, 15

Statutes:

Clayton Act, Section 4, 15 U.S.C. sec. 15 ..... 4, 6

Clayton Act, Section 16, 15 U.S.C. sec. 26 ..... 5, 6

Sherman Act, Section 1, 15 U.S.C. sec. 1 4

Federal Rules of Civil Procedure:

Rule 56(c) 5

Rule 56(f) 4, 5, 14

PAGE

Other:

Antitrust Law—Private Actions: The Supreme Court Bars Treble Damage Suits by Indirect Purchasers, 56 North Carolina Law Review 341 (1978) 9

Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* 75 Yale Law Journal 373 (1976) 7

Scaling The Illinois Brick Wall, 63 Cornell Law Review 309 (1978) 9

Sullivan, *Law of Antitrust* (1976) 6

The Deterrent Effect of Antitrust Enforcement: A Theoretical And Empirical Analysis, Center For Econometric Studies of the Justice System, Hoover Institution, Stanford University, (1978) 20

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It should first be noted that counsel for these consumers is also the counsel for the consumer in *Reiter v. Sonotone et al.*, certiorari granted January 8, 1979.

Petitioners, each a consumer, state a cause of action based on Resale Price Maintenance *for which there is absolutely no reliance on the "pass-on" theory of damages*,* and petition this Court to issue a Writ of Certiorari to review the summary dismissal of this action by the District Court on November 23, 1977, et seq. under the "general rule laid down by the Supreme Court in Illinois Brick" (A-8). The Circuit Court affirmed on August 21, 1978 (A-1).

OPINIONS BELOW

The Circuit Court opinion is reported in 581 F. 2d 1308 and is reprinted herein at A-1. The Circuit Court denial of rehearing *en banc* is not reported but is reprinted herein at A-6. The District Court orders are not reported but are reprinted here at A-6 (11/23/77); A-10 (11/30/77); A-10 (12/21/77); A-12 (12/23/77); and A-13 (1/6/78).

* There could, of course, be situations in which vertical price fixing raises a "pass-on" question and the consumer could be barred by the rule of *Illinois Brick*. For example where a manufacturer controlled the price at which wholesalers sold to retailers then the consumers would have to rely on the "pass-on" theory of damages in a suit against the manufacturers for the overcharge to the retailers thereafter "passed-on" to the consumers by the retailers. In contrast herein, the offense is targeted at the retail level which is a distinction this Court recognized in footnote 24 of *Illinois Brick*, noted *infra*. Hereinafter "Resale Price Maintenance" is used to describe the offense targeted at the retail level where in such instance the Petitioners maintain that *Illinois Brick* should not even enter the discussion let alone be a bar to this action as was affirmed in the first paragraph of the Circuit Court's opinion. (A-1).

JURISDICTION

The Eighth Circuit opinion was issued on August 21, 1978, and a Petition For Rehearing was denied by that Court on September 15, 1978. On September 29, 1978, the Eighth Circuit stayed the issuance of the mandate for a period of ninety days. On December 14, 1978, the Eighth Circuit stayed the issuance of the mandate for a further period of time "to and including March 28, 1979." It is noteworthy that petitioners' motions had asserted that the issue in *Reiter* would "also be dispositive of this consumer antitrust action."* Similarly, Petitioners' application for an extension of time to file for certiorari was granted by Order of December 14, 1978. Mr. Justice Blackmun granted the sixty day maximum provided by statute "to and including February 12, 1979". This Petition is being filed within said time limit and jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTION PRESENTED

Does the rule of *Illinois Brick* apply to a Resale Price Maintenance action? That is, the District Court summarily held that, as a matter of law, the rule of *Illinois Brick* "applies to *all* alleged substantive violations of the antitrust laws". (emphasis herein) (A-11). Is that not error, as a matter of law, because in an action for Resale Price Maintenance the con-

* The respondent/manufacturers in their letter of January 23, 1979, to this Court opposing a further extension of time in which to file this Petition assert that the Eighth Circuit disposed of this action on purely procedural grounds, but they fail to disclose that such grounds were tied to the "control" question of footnote 16 in *Illinois Brick*. Further, the above stays by the Eighth Circuit show clearly that the result is tied into Reiter. See footnote 2 of the Circuit opinion herein citing *Reiter* (A-5) as an alternative ground obviously given great weight by the Circuit.

sumers suffer *direct* injury and in no way do they rely on the "pass-on" theory of damages?

SUBSIDIARY/ALTERNATIVE QUESTIONS

First: Was it not error for the lower Courts to not only ignore documentary evidence of "control" submitted under footnote 16 of *Illinois Brick* but also to deny timely requested discovery thereon?

Second: Was it not error for the lower Courts to require formal affidavits under Rule 56(f) (F.R.C.P.), but if not, then has not the Eighth Circuit adopted an impossible "Catch Twenty-two" standard for such affidavits?

Third: Was it not error to deny amendment to the complaint to add retailers as named defendants?

Fourth: Was it not error to deny the claim for injunctive relief under section 16 of the Clayton Act as distinguished from section 4 of said law?

STATUTES AND F.R.C.P. INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. Section 1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is declared to be illegal . . . ."

Setion 4 of the Clayton Act, 15 U.S.C. Section 15, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the

amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16 of the Clayton Act, 15 U.S.C. Section 26, provides:

"That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . ."

Rule 56(c) of the F.R.C.P., provides:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

Rule 56(f) of the F.R.C.P., provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

STATEMENT OF THE CASE

The Complaint was filed May 27, 1977, in the District Court of Minnesota pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. secs. 15 and 26) alleging, a Resale Price Maintenance violation of Section 1 of the Sherman Act (15 U.S.C. sec. 1), and was assigned to the Honorable Donald D. Alsop.

This Consumer antitrust action alleges *Resale Price Maintenance* by the defendants/respondents (sometimes herein referred to as "manufacturers") of the price at which retailers sold snowmobiles to the petitioners (sometimes herein referred to as "consumers"). The defendant International Snowmobile Industry Association is alleged to be the vehicle by which the alleged illegal practices were arranged and implemented.

The Petitioners' brief to the District Court stated, "let's put the industry 'game plan' before the jury *right now* for liability/impact." (CA8 App. 116) (emphasis *not* added herein). The industry 'game plan' is the Resale Price Maintenance scheme. It is a simple one. Retailers were complaining bitterly to their suppliers about deterioration of profit margins because of price cutting competition among retailers which was stimulated by a large supply of machines being manufactured. The result was a price-competitive buyer's market for the consumers. In response to their retailers, the manufacturers got together and hired a new executive secretary for their Association. The result was an industry 'game plan' to restrict production and maintain the price at which the retailers sold to the consumers. The buyer's market disappeared. It was a market controlled by a cartel. It is a hornbook Resale Price Maintenance *per se* violation. E.g. Sullivan, Law of Anti-

trust (1976) pp. 268-69.* Jurisdiction in the District Court was invoked under sections 4 and 16 of the Clayton Act.

ARGUMENT

WITHOUT "PASS-ON", *ILLINOIS BRICK* IS NO BAR

Petitioners have no quarrel with the rule of *Illinois Brick* because *AS A MATTER OF LAW* it does not apply where the plaintiffs do not rely on the "pass-on" theory of damages as is the case in a Resale Price Maintenance action.

"Pass-on" is nothing more than a theory of proving damages. It arises, for example, where manufacturers conspire to fix *their* prices only and the resulting illegal overcharge is first paid by those who buy directly from the manufacturers and then the overcharge is "passed-on" in the price those direct purchasers charge their customers who then become so called indirect purchasers in relation to the manufacturers. That is the typical horizontal price fixing case. This Petition does not concern the "pass-on" theory of damages. This is a Resale Price Maintenance case. The claim is that the manufacturers maintained prices at which the retailers sold snowmobiles to consumers. The overcharge arose only at the time of the sale by the retailer to the consumer. The overcharge was incurred *directly* by the consumers at the point of purchase from retailers. *Illinois Brick* does not concern the question of "standing". It concerns the question of whether or not a plaintiff rel' s on the "pass-on" theory of damages. 431 U.S. at 728, fn. 7. The District Court did not grasp the distinction and in-

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* Professor Bork describes this cartel in his exhaustive writing titled, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 75 Yale L. Journal 373 (1976) at the bottom of page 393 and over onto page 394.

stead mis-characterized plaintiffs' description of "pass-on" as though it somehow is a "substantive violation" in itself (A-11, fn. 1). That is wrong because it is only a *theory of proving damages*. It simply is not relied on by these consumers injured by vertical price fixing at the retail level.

Ever since this Court's opinion in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), Resale Price Maintenance has been recognized as a separate and distinct substantive body of antitrust law. E.g., see A.B.A. Sec. of Antitrust Law, Monograph 2, Vertical Price Restrictions (1977), esp. pp. 80-82 and fn. 337 on p. 82 citing Professor Bork. See also, this Court in *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, at 51, fn. 18 (1977); *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968), especially fn. 7, at 151, notes manufacturers resale price maintenance plans.

The District Court herein applied the proscription of *Illinois Brick* in blanket fashion "to *all* alleged substantive violations of the antitrust laws" (A-11) (emphasis herein). However, in this case the overcharge *arises* and is suffered by the consumer at the time of the purchase from the retailer. The consumer suffered the overcharge *directly* by the activity of the manufacturer targeted at the price at which the consumer purchased from the retailer. If the consumer cannot recover the overcharge then it will never be recovered because no one else paid it.

In *Gas-A-Tron of Arizona v. American Oil Co.*, 1977-2 Trade Cases para. 61,789 (D.Ariz. 12/7/77), that District Court denied summary judgment where "*the price at which plaintiffs purchased was the one that was fixed*" and therefore no "pass-on" theory would be necessary to prove damages, *supra*, at p. 73,245, (emphasis herein). The Arizona District Court analyzed the "pass-on" issues of *Hanover Shoe* and *Illinois*

Brick and the Resale Price Maintenance distinction became apparent as it should herein to this Court.

See also, *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 1978-1 Trade Cases, para. 61,839 (C.D. Cal. 1/25/78) where that Court ruled that *Illinois Brick:*

> ". . . Precludes recovery on behalf of any consumer that bought from a vendor *that otherwise would have had his own right of action* for the antitrust violation concerned." *Supra*, at p. 73,497 (emphasis herein).

In a Resale Price Maintenance case even an innocent retailer has no action to recover the *overcharge* itself because it arises only at the time the consumers purchase and only the consumers pay it. Unless the consumers recover the overcharge, no one will ever recover it. The Third Circuit has refused to "leave a gaping hole in the administration of the antitrust laws" by over-extending the rule of *Illinois Brick* even in a horizontal price fixing case. *Sugar Industry Antitrust*, 1978—Trade Cases, para. 61,394 at page 73,953 (3rd Cir. 2/6/78).

A law review writer noted directly that *Illinois Brick* should not be a bar to the Resale Price Maintenance action in *Reiter*, because it "does not require the use of pass-on theory". *Antitrust Law—Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchasers.* 56 North Caroline Law Review 341, 355, fn. 84 (1978). The Eighth Circuit ordered that *Illinois Brick* was to be briefed in *Reiter*. It was briefed and argued distinctively but that Court did not decide the question. (Reiter fn. 3 at A-14 in that Petition).

The well-known Cornell Law Review article on *Illinois Brick* recognizes the distinction where "vertical restraints" are alleged. See, *Scaling The Illinois Brick Wall*, 63 Cornell Law Re-

view 309, 331 (1978). Those law review writers start out in footnote 2 by defining passing-on as "the process by which a businessman who has been overcharged adjusts his own price to reflect the overcharge", *supra*, at p. 309. In contrast herein, the retailers were not overcharged.

The footnote 96 in the Cornell Law Review article, and the case citation therein, are directly relevant here because exactly what the Court found lacking in *Donson Stores* is what this case is all about. That Court said that what was lacking was described as follows:

> "an allegation that the alleged price fixing occurred at the point of their purchase, i.e., that the *manufacturers were guilty of unlawful vertical price fixing at the retail level . . .*" footnote 96, *supra*, at p. 331. (emphasis herein)

This Court cited the example of *Donson Stores* in footnote 24 of *Illinois Brick* with regard to "ultimate consumers" and then in the following text distinguished actions "brought against defendants *at the retail level*," 431 U.S. at 741. (emphasis herein). Petitioners herein are of course bringing such an action for an offense committed *at the retail level*, i.e. this Court has already noted the distinction urged by Petitioners. The Cornell Law Review article notes the fallacy of a line of vertical transactions *triggering* an indirect purchaser analysis as the lower courts did herein, *supra*, at p. 332.

In summary: There is a whole body of long and clearly distinctive antitrust law left untouched by *Illinois Brick*. It is the law of Resale Price Maintenance. The "pass-on" theory of damages does not enter the picture. Consequently, first and foremost the lower courts should have denied summary judgment "as a matter of law" under the prerequisite of Rule 56 (c) of the Federal Rules of Civil Procedure. This they failed

to do and instead went off on the question of the "control" exception of footnote 16 in *Illinois Brick* which will be argued alternatively hereinafter.

FIRST ALTERNATIVE QUESTION

THE QUESTION OF "CONTROL" UNDER THE EXEMPTION OF FOOTNOTE SIXTEEN IN *ILLINOIS BRICK* PRESENTS A FACT QUESTION ON WHICH NOT ONLY HARD DOCUMENT EVIDENCE WAS PRESENTED BUT ALSO DISCOVERY WAS TIMELY REQUESTED AND EXPRESSLY DENIED.

This is the *second** and distinct reason for exemption from *Illinois Brick*. Here we are concerned with ownership or other business-type control or ownership** and not the offense itself. The Circuit recognized this question of fact but said that:

> "As the district court noted, however, appellants failed to request a continuance *or to seek any other relief* under Fed. R. Civ. P. 56(f) (emphasis herein) (A-4).

That is not what the District Court said. The District Court's statement is found in footnote 2 of the subsequent order December 21, 1977, (A-11) where it only said that plaintiffs did not "request a continuance". It is obvious that the District Court meant *formal* Rule 56(f) affidavits which Petitioners now defy any legal mind to do in the Eighth Circuit

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* The first reason as discussed hereinabove is the Resale Price Maintenance offense which itself is also "another situation in which market forces have been superseded", to be within the reasoning of the footnote 16 and exempt from *Illinois Brick*, 431 U.S. at 736, fn. 16.

** For example, the particular retailers herein purchased from wholly-owned subsidiary distributorship operations of the defendants Yamaha and Bombardier.

under the "Catch Twenty-two" of *Willmar Poultry*. Petitioners pleaded, argued (written and oral), begged and cajoled for discovery on the footnote 16 "control" question, so much so that the District Court's first order of 11/23/77 discloses that they did indeed seek discovery:

> "The palintiffs contend that *discovery may well reveal evidence* of cost—plus contracts or of manufacturer *control* of snowmobile retailers. . . . Such a contention amounts to mere speculation . . ." (CA8 App. 108 l. 5-10) (emphasis herein)

To say it was "mere speculation" ignores evidence that was presented. Plaintiffs presented hard document evidence in the form of the sales slip titled "*Authorized* Yamaha Dealer" (emphasis herein) (A-14). Plaintiffs wanted discovery behind that word/relationship.* The Eighth Circuit Record discloses exactly what plaintiffs said and did in the District Court, highlighted as follows hereinafter:

CA8 App. 66 l. 2: (Plaintiffs opposing memorandum asking for discovery)

CA8 App. 86 l. 15-23: (Plaintiffs argument distinguished the types of control here, one a matter of law the other a question of fact)

CA8 App. 91 l. 20: (footnote 16 "control" argued to the Court)

CA8 App. 92 l. 24-25—93 l. 1-6: (Plaintiffs introduced the sales slip and asked for discovery behind it)

CA8 App. 94 l. 10-20: (Plaintiffs argued sales slip evidence "control" asking discovery)

* The Cornell Law Review article *supra*, footnote 84, at page 328 noting the "far-reaching franchisor control" involved in authorized franchisee relationships.

CA8 App. 94 l. 24-25—95 l. 1-2. (Plaintiffs emphasized that violation of Resale Price Maintenance law is distinct from footnote 16 "control")

CA8 App. 110: (Plaintiffs' letter pointing out that R.P.M. is without "pass on" and therefor is outside the scope of Illinois Brick)

CA8 App. 113-115: (Plaintiffs' later brief repeating their earlier requests for discovery on "control")

CA8 App. 129: (Plaintiffs' letter citing *Fifth* Circuit statement on Rule 56 (f) discovery)

CA8 App. 136: (Plaintiffs' later brief asking what Judge Alsop meant by his statement that they had not asked for a "continuance")

In summary: Footnote 2 of the District Court's second Memorandum (A-11) makes a statement that petitioners submit is not true on the record unless it is limited to formal affidavits. They did ask for a "continuance" to permit "depositions" (i.e., limited discovery). The record is clear that plaintiffs did *not* stand by silently about discovery.

SECOND ALTERNATIVE QUESTION

WAS IT NOT ERROR TO REQUIRE FORMAL AFFIDAVITS UNDER RULE 56(f) (F.R.C.P.) BUT IF NOT, THEN HAS NOT THE EIGHTH CIRCUIT ADOPTED AN IMPOSSIBLE "CATCH TWENTY-TWO" STANDARD?

This counsel was also counsel for the plaintiffs in the two *Willmar Poultry* actions. Plaintiffs actually filed Rule 56(f) affidavits in *Willmar I* but they were brushed aside as though "pro forma" was an anethema to antitrust conspiracy affidavits, 520 F. 2d at 297. The Circuit expressed its "Catch Twenty-two" rule as follows:

> ". . . the plaintiffs made no attempt to *identify* what, if any, *facts* were *within the defendants' exclusive control* and how if at all, discovery would assist them in bringing those facts *to light*." (520 F. 2d at 297) (emphasis herein)

Obviously, if facts can be *identified* they are not in the *exclusive* control of the defendant and no discovery is needed to bring them *to light*. This would be humorous if it hadn't been used to destroy not only that case but also this one so that the public interest suffers from such reasoning.

An identical "Catch Twenty-two" was recognized and avoided recently with regard to pleading facts of fraudulent concealment under Rule 9(b), F.R.C.P. *Caribe Trailer Sys. v. Puerto Rico Maritime Shipping*, 1978-2 Trade Cases ¶62,133, page 74,996, fn. 1 (D. Col. 7/8/78). To expect "specificity" is more than Rule 9(b), F.R.C.P. requires. *Chambers & Barber v. General Adjustment*, 60 F.R.D. 455, 459, fn. 7 (S.D.N.Y. 1975). That is fair justiciable reasoning.

Formal affidavits are not required under Rule 56(f). Judge Larson* himself does not require them today. The Ninth Circuit analyzed this in *Hamilton v. Keystone Tankship Corp.*, 539 F. 2d 684, 686, esp. fn. 1 (9th Cir. 1976). See also, the strong statement by the Fifth Circuit on the resulting absurdity of it all in *Parrish v. Bd. of Comrs. of Ala. St. Bar*, 533 F. 2d 942, 947 (5th Cir. 1976), quoted by Petitioners to the District Court herein as follows:

> In effect, the argument of appellees amounts to a contention that a mere denial of improper conduct by the party against whom discovery is sought is adequate to support a refusal to compel discovery, unless the opposing party is able to counter such denial by *specific affidavit*. Such a rule would frustrate the discovery process and tend to erect an unreasonably protective shield around parties possessing material relevant and necessary to fair litigation. (emphasis herein)

The Circuit herein not only does violence to the spirit** of Rule 56(f) and conflicts with other Circuits on that rule but also stifles and negates this Court's holdings in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, at 473 (1962), which was restated and added to in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, at 746 (1976). The Eighth Circuit did cite (A-4) this Court's holding in

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* Judge Larson was the District Judge in *Willmar Poultry* and in *Reiter*.

** Rule 56(f) bids the courts to *exercise a spirit of liberality in granting time enough for the parties reasonable to develop the full facts upon the issues presented . . . The practical matter of access to proof is a factor to be seriously considered* on a motion for summary judgment, *particularly where the crucial facts are largely within the knowledge or control of the moving party." Moores Fed. Pract. Rules Pamphlet Part 1 as amended 1975, at page 1039.* (emphasis herein)

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1967), but, that opinion should be carefully examined because it discloses not only that the action had been pending for eleven years but also that the motion for summary judgment had been pending for five years. Obviously, there was ample opportunity for discovery! 391 U.S. at 272-273. In this case the plaintiffs submitted hard document evidence of "control" and also made a clear and timely request to be allowed discovery on that footnote 16 question but were summarily denied it.

These were *Illinois Brick* motions filed in the havoc and confusing aftermath of that opinion. The complaint was filed on May 27, 1977. *Illinois* Brick was decided June 9, 1977. The first motion was filed on July 13, 1977. Oral argument was held on September 16, 1977. That is a rapid succession and the many docket entries reproduced in the Circuit record show only the tip of the iceberg of the activity engaged in by plaintiffs' counsel at that time, highlighted as follows: Plaintiffs were busy trying to perfect service or determine why it could not be perfected on many of the foreign (Japan and Canada) defendants. Plaintiffs contacted lawyers in Canada and answered objecting correspondence from Canadian counsel, most of which defendants were determined to have sold out or to have gone bankrupt, claiming a defense thereby. The District Court entered a special order to preserve Yamaha's objection to service. Plaintiffs worked out a special stipulation of dismissal with counsel for Honda which tolled the statute of limitations so that a complaint could be filed again on them if discovery substantiated the indication plaintiffs already had about them. That protected the interest of the absent class members and the public and is extended today. Many stipulations were worked out to allow defendants extended time to

answer. This counsel also made numerous visits to the Clerk's office regarding service of process in Japan. Plaintiffs worked out a stipulation for a change of name for Brunswick Corp. because their division had been served and they considered challenging the service. There were eighteen defendants many of whom were foreign and some with confusingly named American subsidiary distribution corporations. Just getting the preliminaries out of the way in such an antitrust suit is time consuming. Plaintiffs even worked out a stipulation of fact on the retailers for the *Illinois Brick* motion of defendants. This counsel also has spent time working on phone inquiries from the District Judge's law clerk on behalf of the Court as to which of the defendants were properly served and before the Court. At such time this counsel was also a leader in contact with this Court on a possible change in the wording of footnote 16 in *Illinois Brick* and that correspondence is in the files of this Court.

In summary: By requiring formal Rule 56(f) affidavits under an impossible "Catch Twenty-two" standard and not recognizing the documented evidence of "control" while denying any discovery on that question, the Eighth Circuit stands in conflict with the Ninth and Fifth Circuits on Rule 56(f) and the "ample opportunity" discovery standard set by the opinions of this Court.

THIRD ALTERNATIVE QUESTION

ALTHOUGH CO-CONSPIRATORS WERE ALLEGED IN THE COMPLAINT THE RETAILERS WERE NOT ALLOWED TO BE NAMED IN AN AMENDED COMPLAINT.

The District Court flatly denied the plaintiffs' motion to amend their complaint. The complaint was drafted *prior* to *Illinois Brick*. The amendment motion would have named the two identified retailers as representatives of a class of co-conspirator defendants.* The Complaint had already alleged unnamed co-conspirators (CA8 App. 9, Cp. para. 10). Amendment would have made clear that the consumers were in the position of direct purchases from the retail co-conspirators** of the manufacturers (CA8 App. 81-82, 86).

The manufacturers exposed what happened herein where they said in their memorandum to the District Court that the "plaintiffs have pleaded their case and lost" (CA8 App. 125). That is archaic. The notion that pleading is a "game of skill" to be engaged in by counsel has been repudiated by this Court in *Conley v. Gibson*, 355 U.S. 41 at 47-48 (1957).

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* Of course the retailers need not be named as defendants even if they are co-conspirators because it is recognized antitrust law that not all co-conspirators need be named as defendants. E.g. see, Cornell Law Review aricle, *supra*, footnotes 97 and 98 at page 332.

** The Cornell Law Review article recognizes this as a "form of nonfinancial dominance: conspiracy", where the ultimate buyers, such as Petitioners herein, can show that there are "no competitive markets separating them from the illegal actions of the manufacturer" and thereby can avoid the prohibition of *Illinois Brick*, Cornell Law Review, *supra*, at 328, fn. 84.

FOURTH ALTERNATIVE QUESTION

THE CLAIM FOR INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT SHOULD NOT HAVE BEEN DISMISSED.

The Complaint seeks section 16 injunctive relief (CA8 App. 7, Cp. paras. 1 and "C"). In footnote 2 of the Circuit opinion herein the Court says that this "action" is barred by the result of *Reiter* (A-5) (emphasis herein). That is not an accurate reading of the *Reiter* opinion. The last sentence of the last footnote in the *Reiter* opinion excluded section 16 injunctive action from that result. Section 16, as a matter of hornbook antitrust law is a broader provision than a section 4 action for damages.* This is a gross oversight by the Circuit and should be corrected by this Court. Of course, injunctive relief under section 16 has nothing to do with damages so the "pass-on" rule of *Illinois Brick* is not involved, *as a matter of law*, and summary judgment should have been denied under the prerequisite of Rule 56(c).

PUBLIC POLICY

This Court recently again expressed the two purposes behind section 4 of the Clayton Act in *Pfizer Inc. v. Government of India*, —— U.S. ——, 54 L.Ed 2d 563, at 570 (1978).

The *first* is to deter violators and deprive them of the 'fruits of their illegality' and the *second* is 'to compensate victims'. Both of those purposes will be negated if this Court does not allow these consumers to recover damages. *First*, the over-

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* The Cornell Law Review article, *supra*, footnote 60 at page 322, recognizes the distinction made herein between sections 4 and 16.

charge* will never be recovered by anyone, hence, the violaters will not be deterred and they will get to keep 'the fruits of their illegality', *Illinois Brick*, 431 U.S. at 733. *Second*, the consumer victims of the antitrust violations will not be compensated for their injuries.

Petitioners ask this Court to take special note of a recently concluded study by the Center For Econometric Studies Of The Justice System, Hoover Institution, Stanford University (December 1978). That study was titled THE DETERRENT EFFECT OF ANTITRUST ENFORCEMENT: A THEORETICAL AND EMPIRICAL ANALYSIS. In a letter to this counsel, Mr. Michael K. Block, Director of the Center, expressed the conclusion that antitrust enforcement deters price fixing behavior "only when there is a credible threat of a private action". Mr. Block's letter is reprinted herein for the convenience of this Court (A-13).

The amicus brief in *Reiter* by the Department of Justice emphasizes the great public interest at stake in private antitrust enforcement. This Court has called the antitrust laws the "magna carta" of the free enterprise system and recently noted "a congressional policy favoring private enforcement of the antitrust laws" and added that "*undoubtedly there exists a strong national interest in antitrust enforcement*". *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, at 635 (1977). (emphasis herein).

*"Analytically equivalent to an excise tax" on the snowmobiles, *Illinois Brick*, 431 U.S. at 741, footnote 25.

CONCLUSION

"Pass-on" is not a damage theory in this Resale Price Maintenance case.

The lower courts have overlooked or misapprehended the following:

1. That this Resale Price Maintenance action is outside the scope of *Illinois Brick, as a matter of law.*

2. That hard document evidence was submitted by Petitioners on the question of control (Sales slip marked "Authorized" Dealer) for the factual exemption under footnote 16 of *Illinois Brick.*

3. That Petitioners made express, repeated and persistent requests to the District Court for discovery on the question of "control" regarding said footnote 16 factual exemption.

4. That formal affidavits are not required under Rule 56(f).

5. That *Willmar I* contains a perfect "Catch Twenty-two" regarding formal Rule 56(f) affidavits.

6. That the holding of *Reiter* does not bar this "action" insofar as section 16 injunctive relief is claimed.

7. That this private antitrust action is vested with a public interest especially because there is no parallel action by the government.

This Petition presents this Court with the first opportunity to make it clear that *Illinois Brick* was not a reactionary decision*, but instead was merely to correct what this Court perceived to be a complicated one-sided rule resulting from the

* As it has been attacked in Congress. For example, see Senator Scott's remarks about consumer reaction during hearings on corrective legislation. *Hearings Before The Subcommittee On Antitrust And Monopoly, First Session on S.1874,* July 21, 22 and September 9, 1977, at page 10. cf. *Bricking Up An Antitrust Loophole,* N. Y. Times editorial, Friday, October 28, 1977.

Hanover Shoe case; and today there remains a body of antitrust law left untouched by *Illinois Brick* because in an action for Resale Price Maintenance there is no concern with the "pass-on" theory of damages.

If this Court does not now so clarify the rule of *Illinois Brick* it will leave the law of Resale Price Maintenance in a "no man's land" devoid of recovery of the overcharge.

Petitioners submit that their action should have survived summary judgment *as a matter of law* under the prerequisite of Rule 56(c) or, alternatively, as a fact question of control under footnote 16 of *Illinois Brick*. At the very least, Petitioners lastly submit that this Court should fairly see fit to hold this Petition in abeyance pending the decision in *Reiter*, to then be remanded in light thereof should that result be a reversal of the Eighth Circuit.

Dated: February 7, 1979.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1035

JOSEPH L. BECKERS, et al

Appellants,

vs.

INTERNATIONAL SNOWMOBILE
INDUSTRY ASSOCIATION, et al

Appellees.

Submitted: May 19, 1978
Filed: August 21, 1978

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA.

Before, VAN OOSTERHOUT, Senior Circuit Judge, LAY and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

Appellants, purchasers of snowmobiles, brought this antitrust class action alleging that appellees had engaged in several anticompetitive practices, including resale price maintenance. The district court[1] held that as "indirect purchasers," appellants were precluded from maintaining their action under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The

[1] The Honorable Donald D. Alsop, United States District Court for the District of Minnesota.

court granted appellees' motion for summary judgment. We affirm.

I

Appellants, having purchased their snowmobiles for personal use, are ordinary consumers. It is conceded that the snowmobiles were purchased from retailers. None was purchased directly from any of the appellees, which include manufacturers, distributors, and a trade association.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court held that, except in certain limited circumstances, antitrust defendants may not raise as a defense that plaintiff, who purchased directly from the defendants, had passed-on the illegal overcharge to other "indirect purchasers." In *Illinois Brick Co. v. Illinois, supra*, the Court merely extended the rationale of *Hanover Shoe* and held that indirect purchasers could not sue for treble damages claiming that the overcharge had been "passed-on" to them. In short, *Illinois Brick* held that "pass-on", which was not permitted to be used defensively in *Hanover Shoe*, could not be asserted offensively by indirect purchasers. *See Illinois Brick Co. v. Illinois, supra*, 431 U.S. at 735. Thus, after *Illinois Brick*, only "the overcharged direct purchaser, and not others in the chain of manufacture or distribution" may sue for treble damages under section 4 of the Clayton Act. *Id.* at 729.

The Court in *Illinois Brick* noted, however, that *Hanover Shoe*, while stressing the narrow scope intended for any exception to the general rule, cited a preexisting cost-plus contract as a situation in which the defense of "pass-on" might be permitted. The Court then stated:

> Another situation in which market forces have been superseded and the pass-on defense might be permitted

> is where the direct purchaser [from whom plaintiffs purchased] is owned or controlled by its customer.

Illinois Brick Co. v. Illinois, supra, 431 U.S. at 736 n.16.

Appellants argue in this appeal that appellees had controlled the sales practices of the retailers from whom they purchased and had engaged in resale price maintenance. This, they argue, falls within the exceptions to *Illinois Brick* articulated above. Thus, appellants argue, despite their status as indirect purchasers, they are not precluded from maintaining their action. Because of the procedural grounds upon which we base our disposition of this appeal, we need not decide this question.

II

In support of their summary judgment motion, appellees filed affidavits with the district court. *See* Fed.R.Civ.P. 56(b). These affidavits controverted appellants' allegation that appellees had controlled the retailers from whom appellants had purchased their snowmobiles. Thus, as the district court found, the affidavits negated appellants' contention that appellees' alleged violations constituted an exception to *Illinois Brick*. The district court stated:

> The facts [as] set forth in the affidavits supplied by the defendants are uncontroverted. . . . The persons from whom the named plaintiffs did make direct purchases neither controlled nor were controlled by either the plaintiffs or the defendants. In addition, neither the named plaintiffs nor the persons from whom these plaintiffs did make direct purchases made any direct purchases pursuant to a cost-plus contract.

Apparently resting upon the allegations set forth in their complaint, appellants did not file counter-affidavits or engage in or attempt to engage in any discovery. Fed.R.Civ.P. 56(e)

provides that a party opposing a motion for summary judgment:

> may not rest upon the mere allegations . . . of his pleading, but . . . by affidavits . . . [the party] must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In *Wilmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976), we held that summary judgment is always appropriate in antitrust cases, whether or not the complaint alleges a violation of the antitrust laws, when "the party resisting the motion . . . [merely relies] upon the pleadings and submits no evidence to rebut the moving party's conclusive demonstration of absence of a genuine issue of material fact." *Id.* at 293; *see First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-90 (1967). It is clear, as the district court found, that appellants failed to rebut appellees' affidavits in this case.

Appellants contend that, because many of the facts underlying this complicated action are within the knowledge and control of appellees, they were unable to file affidavits or engage in discovery. As the district court noted, however, appellants failed to request a continuance or to seek any other relief under Fed.R.Civ.P. 56(f), which provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In order to obtain relief under Fed.R.Civ.P. 56(f), a party must "state by affidavit the reasons why he is unable to present the necessary opposing material. . . . [The] affidavit . . . need not contain evidentiary facts going to the merits of the case; rather, it is merely a sworn statement explaining why these facts cannot yet be presented." C. Wright & A. Miller, Federal Practice and Procedure § 2740 at 722-23 (1973).

Appellants merely filed a statement in opposition to appellees' motion for summary judgment. The statement included a substantive argument that appellants' claims were an exception to *Illinois Brick*. Appellants did not file an affidavit setting forth reasons why they were unable effectively to rebut appellees' affidavits or to engage in discovery.

Having failed to rebut appellees' affidavits, or to file an affidavit explaining why they were unable to do so, appellants did not sufficiently establish the existence of a material factual dispute concerning their contention that, despite their status as indirect purchasers, their claims constituted an exception to *Illinois Brick*. Thus, summary judgment was appropriate.

We affirm the judgment of the district court.[2]

LAY, Circuit Judge, Concurring.

I concur in the result reached. I do not, however, concur in footnote 2 for the reasons set forth in my dissenting statement to a denial of the rehearing en banc in *Reiter v. Sonotone Corp.*, filed August , 1978.

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[2] Alternatively, we note that appellants' action is barred by our recent decision in *Reiter v. Sonotone Corp.*, No. 77-1474 (8th Cir. June 19, 1978). In that case, we held that consumers failing to allege a commercial or competitive injury do not suffer injury to "business or property" under § 4 of the Clayton Act, 15 USC § 15 (1976), and may not sue for treble damages.

A true copy.
Attest:
CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1978

(Caption omitted in printing)

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

September 15, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(Caption omitted in printing)

MEMORANDUM ORDER

This matter comes before the court upon motions for summary judgment brought by the following defendants: Scorpion, Inc.; Yamaha Motor Company Limited; Brunswick Corporation [Mercury Marine]; Massey-Ferguson, Inc.; Bombadier Limited; Coleman Co., Inc.; International Snowmobile Industry Association; Kawasaki Motor Corp. U.S.A.; Deere & Co.; A.M.F. Inc.; U. S. Suzuki Motor Corporation, Limited; Outboard Marine Corporation; Artic Enterprises, Inc.; and Textron, Inc.

On January 12, 1974, the plaintiff Joseph L. Beckers (Beckers) purchased a snowmobile manufactured by the Yamaha Motor Company Limited from McNamara's Cycle Sales, Inc., a Minnesota corporation (McNamara's). On January 16, 1976, the plaintiff Daniel J. Miotke (Miotke) purchased two snowmobiles manufactured by the defendant Bombadier Limited from Danner Landscaping & Sales, Inc., a Minnesota corporation (Danner).

On May 27, 1977, Beckers and Miotke filed this action on behalf of themselves and as representatives of all persons in the United States who directly or indirectly purchased snowmobiles or supplies at prices affected by the violations of federal antitrust laws which the plaintiffs allege. The defendants are manufacturers and wholesale distributors of snowmobiles and supplies and a snowmobile industry trade association.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The general rule is that only an overcharged direct purchaser, and not others in the chain of manufacture or distribution, is such a person "injured in his business or property." *See Illinois Brick Co. v. Illinois*, 97 S.Ct. 2061 (1977).

Neither Beckers nor Miotke made any direct purchases from any of the defendants. Because the plaintiffs' claim is premised upon sales from McNamara's to Beckers and from Danner to Miotke, and not upon any direct sale from the defen-

dants to the plaintiff, the general rule precludes recovery.

The plaintiffs argue that the facts of this case remove it from the general rule laid down by the Supreme Court in *Illinois Brick*. The plaintiffs contend that indirect purchases involving cost-plus contracts and those involving controlled persons are excepted from the general rule barring recovery by indirect purchasers.

The court concludes that, even if *Illinois Brick* were to permit of the exceptions which the plaintiffs suggest, neither exception to the general rule would be applicable to the matter before the court. The affidavits on file establish that neither Beckers nor Miotke made their purchases of snowmobiles pursuant to a cost-plus contract with McNamara's or Danner. Likewise, neither McNamara's nor Danner had a cost-plus contract with any of the defendants. Secondly, neither Beckers nor Miotke owns nor controls McNamara's nor Danner. Likewise, none of the defendants own or control McNamara's or Danner. Therefore, neither of the exceptions to the general rule suggested by the plaintiffs would apply to the facts of this case.

The plaintiffs contend that discovery may well reveal evidence of cost-plus contracts or of manufacturer control of snowmobile retailers. They reason that, if such evidence existed, it would create a genuine issue of material fact that would make the granting of summary judgment inappropriate. Such a contention amounts to mere speculation[1] and is insufficient to ward off the granting of summary judgment. Rule 56(c), Fed.R.Civ.P.

The record reflects no effective service upon Boa-Ski Limited; Skiroule, Lt'ee; and Sno-Jet, Inc. Therefore, the action will be dismissed without prejudice as to those defendants.

[1] The plaintiffs submitted no affidavits which contradict the facts recited above. Therefore, there is no genuine issue of material fact.

Upon the foregoing,

IT IS ORDERED That the motions for summary judgment brought by the defendants Scorpion, Inc.; Yamaha Motor Company Limited; Brunswick Corporation [Mercury Marine]; Massey-Ferguson, Inc.; Bombadier Limited; Coleman Co., Inc.; International Snowmobile Industry Association; Kawasaki Motor Corp. U.S.A.; Deere & Co.; A.M.F., Inc.; U. S. Suzuki Motor Corporation, Limited; Outboard Marine Corporation; Artic Enterprises, Inc.; and Textron, Inc., be and hereby are granted.

IT IS FURTHER ORDERED That the plaintiffs Joseph L. Beckers and Daniel J. Miotke have and take nothing from the defendants Scorpion, Inc.; Yamaha Motor Company Limited; Brunswick Corporation [Mercury Marine]; Massey-Ferguson, Inc.; Bombadier Limited; Coleman Co., Inc.; International Snowmobile Industry Association; Kawasaki Motor Corp. U.S.A.; Deere & Co.; A.M.F., Inc.; U. S. Suzuki Motor Corporation, Limited; Outboard Marine Corporation; Artic Enterprises, Inc.; and Textron, Inc., by their purported cause of action and the action as to these defendants be and hereby is dismissed with prejudice.

IT IS FURTHER ORDERED That the action as to the defendants Boa-Ski Limited; Skiroule, Lt'ee' and Sno-Jet, Inc. be and hereby is dismissed without prejudice.

IT IS FINALLY ORDERED That the Clerk enter judgment accordingly.

Dated: November 23, 1977.

DONALD D. ALSOP
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(Caption omitted in printing)

ORDER

Counsel for plaintiff has filed notice of motion and motion for relief under Rule 59(e) and 60(b) and to amend complaint and/or add parties under Rules 15 and 21. Submitted with the motions are the plaintiffs statement of points and authorities in support of all motions submitted.

Pursuant to Rule 78 of the Federal Rules of Civil Procedure,

IT IS ORDERED That the motions be submitted and determined without oral hearing upon written statements of reasons in support and opposition.

IT IS FURTHER ORDERED That counsel for defendants submit their statement of points and authorities in opposition to plaintiffs motions on or before December 12, 1977, at which time the matter will be considered submitted.

Dated: November 30, 1977.

DONALD D. ALSOP
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(Caption omitted in printing)

MEMORANDUM ORDER

This matter comes before the court upon the plaintiffs' motion to vacate/amend the court's order of November 23, 1977 granting summary judgment in favor of the defendant. The

plaintiffs also seek leave to amend the complaint upon which the court has ordered entry of judgment.

The plaintiffs argue that *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977), the case upon which the court relied in ordering the entry of judgment, is inapposite. The plaintiffs characterize their cause of action as one based upon "resale price maintenance" and attempt to distinguish *Illinois Brick* as one barring only actions based upon "pass on."[1] The court does not agree.

Illinois Brick states the general rule that only an overcharged direct purchaser, and not others in the chain of manufacture of distribution, is a person "injured in his business or property" within the meaning of that phrase as it is used in section 4 of the Clayton Act, 15 U.S.C. § 15. That rule defines the category of persons entitled to maintain a private action under the antitrust laws so as to exclude persons in the situation of plaintiffs. It applies to all alleged substantive violations of the antitrust laws.

The facts are set forth in the affidavits supplied by the defendants are uncontroverted.[2] The named plaintiffs made no

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[1] The distinction which the plaintiffs attempt to draw seems to be premised on a theory that "pass on," like price fixing or interbrand territorial allocation, is some sort of independent substantive violation of the antitrust laws. Such is not the case. "Pass on" is not a substantive violation; "pass on" only describes the economic effect caused by a substantive violation of the antitrust laws.

[2] Rule 56(e), Fed.R.Civ.P. provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations . . . of his pleadings but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The plaintiffs submitted no affidavits, no depositions and no answers to interrogatories. Nor did the plaintiffs request a continuance to permit them to obtain affidavits or to take depositions. *See* Rule 56(f), Fed.R.Civ.P.

direct purchases from any of the named defendants. The persons from whom the named plaintiffs did make direct purchases neither controlled nor were controlled by either the plaintiffs or the defendants. In addition, neither the named plaintiffs nor the persons from whom these plaintiffs did make direct purchases made any direct purchases pursuant to a cost-plus contract. The court remains convinced that *Illinois Brick* operates to bar any recovery by the plaintiffs and that the entry of judgment was appropriate.

The plaintiffs also seek leave to amend their complaint. Inasmuch as judgment has been entered, a grant of leave to amend would be neither timely nor appropriate.

Upon the foregoing,

IT IS ORDERED That the plaintiffs' motion be and hereby is in all things denied.

Dated: December 21, 1977.

DONALD D. ALSOP
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(Caption omitted in printing)

ORDER

The above action again comes before the court upon the motion of plaintiffs for "Relief Under Rule 59(e) and 60(b)" for an "Order of the Court Vacating/Amending its Orders dated November 23, 1977 and December 21, 1977."

IT IS ORDERED That the motion of the plaintiffs be and the same hereby is in all things denied.

Dated: December 23, 1977.

DONALD D. ALSOP
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(Caption omitted in printing)

ORDER

The above action again comes before the court upon the motion of plaintiffs for "Relief Under Rule 60(b) New Evidence and in the Interest of Justice," seeking an order vacating/amending this court's orders of November 23, 1977, December 21, 1977 and December 23, 1977.

IT IS ORDERED That the motion of the plaintiffs be and the same hereby is in all things denied.

Dated: January 6, 1978.

DONALD D. ALSOP
United States District Judge

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Stanford, California 94305

January 16, 1979

Mr. John F. Thomas
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Suite 500
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360 Wabasha Street
St. Paul, Minnesota 55102

Dear Mr. Thomas,

I recently read that the Supreme Court has granted certiorari to *Reiter v. Sonotone Corporation*. This case is of particular interest to us at the Center because we have just completed an empirical analysis of the deterrent effect of antitrust enforcement. We find that such enforcement deters price fix-

ing behavior only when there is a credible threat of a private action. It is the class action, with its attendant large damages/ settlements, that appears to deter price fixing. I think you will find the enclosed report on our research of considerable interest.

Sincerely,
MICHAEL K. BLOCK
Director, Center for
Econometric Studies
of the Justice System

MKB/kw
enc

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Sales • Parts • Service
"AUTHORIZED YAMAHA DEALER"

opposition

Supreme Court, U. S.
FILED
MAR 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1253

JOSEPH L. BECKERS and
DANIEL S. MIOTKE,
Petitioners,

vs.

INTERNATIONAL SNOWMOBILE INDUSTRY
ASSOCIATION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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March 9, 1979

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
ARGUMENT	7
I. THE COURTS BELOW CORRECTLY RULED ON THE BASIS OF ILLINOIS BRICK AND THE UNCONTROVERTED FACTS OF RECORD THAT SUMMARY JUDGMENT AGAINST PETITIONERS WAS APPROPRIATE	8
II. THE OTHER MATTERS RAISED BY PETITIONERS ALSO RELATE TO ROUTINE PROCEDURAL MATTERS WHICH PROVIDE NO BASIS FOR GRANTING THE WRIT	14
CONCLUSION	16

TABLE OF CASES AND AUTHORITIES

CASES:	Page
Adickes v. *S.H. Kress and Co.*, 398 U.S. 144 (1970)	12
Atlantic States Construction Co. v. *Robert E. Lee & Co., Inc. of South Carolina*, 406 F.2d 827 (4th Cir. 1969)	13
First National Bank of Arizona v. *Cities Service Co.* 391 U.S. 253, (1968)	11
Hamilton v. *Keystone Tankship Corp.*, 539 F.2d 684 (9th Cir. 1976)	
Hanover Shoe, Inc. v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968)	8
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977)	2 *et passim*
King v. *National Industries Inc.*, 512 F.2d 29 (6th Cir. 1975)	13
Kirsch v. *Barnes*, 157 F.Supp. 671 (N.D. Cal. 1957), aff'd, 263 F.2d 692 (9th Cir. 1959)	15
Lacey v. *Lumber Mutual Fire Insurance Co. of Boston*, 554 F.2d 1204 (1st Cir. 1977)	13
Lundeen v. *Cordner*, 356 F.2d 169 (8th Cir. 1966)	13
Mutual Fund Investors v. *Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977)	13
Oglesby v. *Terminal Transport Co., Inc.*, 543 F.2d 1111 (5th Cir. 1976)	13
Parrish v. *Board of Comm'rs of Alabama State Bar*, 533 F.2d 942 (5th Cir. 1976)	
Reiter v. *Sonotone Corp.*, No. 78-690, *certiorari* granted, January 8, 1979	15
School Board of Okaloosa County v. *Richardson*, 332 F.Supp. 1236, (N.D. Fla. 1971)	13
Smith v. *Saxbe*, 562 F.2d 729 (D.C. Cir. 1977)	13
United States v. *Donlon*, 355 F.Supp. 220 (D.Del. 1973), *aff'd*, 487 F.2d 1395 (3rd Cir. 1973)	13
Willmar Poultry Co. v. *Morton-Norwich Products, Inc.* 520 F.2d 289 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976)	14,15

STATUTES AND RULES:	Page
28 U.S.C. §1254 (1)	2
Clayton Act, Section 4, 15 U.S.C. §1	3,9,17,18
Clayton, Act, Section 16, 15 U.S.C. §26	18
Sherman Act, Section 1, 15 U.S.C. §1	3
Federal Rules of Civil Procedure	
Rule 15	17
Rule 21	17
Rule 56	2 *et passim*
Rule 59	5,16
Rule 60	5,16
OTHER AUTHORITIES:	
C. Wright & Miller, Federal Practice and Procedure, §2740 (1973)	14

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1253

JOSEPH L. BECKERS and
DANIEL S. MIOTKE,

Petitioners,

vs.

INTERNATIONAL SNOWMOBILE INDUSTRY
ASSOCIATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the Court of Appeals for the Eighth Circuit (App. A-1 of Petition) is reported at 581 F.2d 1308 (8th Cir. 1978). The Order of the Court of Appeals denying rehearing and rehearing en banc (App. A-6 of Petition) is not officially reported. The "Memorandum Order" of the District Court granting defendants' motions for summary judgment and the District

Court's subsequent orders denying petitioners' motions to vacate the judgment and to amend their complaint are not reported but are reprinted in the appendix to the Petition (App. A-10—A-13).

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1978. A petition for rehearing en banc was denied by the Court of Appeals on September 15, 1978 (App. A-6 of Petition). On December 14, 1978, Mr. Justice Blackmun extended the time to petition for certiorari to and including February 12, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed summary judgment in respondents' favor where it was admitted that petitioners were "indirect purchasers" and therefore precluded from maintaining their antitrust treble damage action under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

2. Whether the Court of Appeals correctly affirmed summary judgment in respondents' favor where their uncontrovered affidavits established that petitioners did not come within any exception to *Illinois Brick*, and where petitioners initiated no discovery, and neither provided evidentiary affidavits as required by Rule 56(e), nor explained by affidavit why they were unable to do so as required by Rule 56(f), Fed.R.Civ.P.

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. §1) and Section 4 of the Clayton Act (15 U.S.C. § 15), as well as Rule 56, Fed.R.Civ.P.

STATEMENT OF THE CASE

On May 27, 1977, petitioners, two individuals who admittedly were "indirect purchasers" of snowmobiles, brought this class action pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15, against 17 snowmobile manufacturers and an industry trade association for alleged violations of Section 1 of the Sherman Act, 15 U.S.C. §1.

On June 9, 1977, this Court decided *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), holding that only "the direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of . . ." Section 4 of the Clayton Act. In mid-July, 1977, on the basis of a stipulation and supporting affidavits [1] demonstrating that petitioners were not direct purchasers of snowmobiles, 14

[1] The stipulation and respondents' uncontroverted affidavits established that petitioner Joseph L. Beckers purchased a Yamaha Snowmobile at retail from McNamara's Cycle Sales, Inc., with retailer McNamara previously having purchased the snowmobile from Yamaha International, Inc. (which, in turn, had purchased it from its parent company in Japan, respondent Yamaha Motor Company, Limited). The stipulation and uncontested affidavits also established that petitioner Daniel J. Miotke purchased two snowmobiles at retail from Gerald Danner, with retailer Danner previously having purchased the two snowmobiles from Bombardier Corporation (which, in turn, had purchased them from its Canadian parent, respondent Bombardier Limited).

defendants [2] moved for summary judgment under *Illinois Brick* on the ground that petitioners suffered no "injury" within the meaning of Section 4 of the Clayton Act. Petitioners did not counter respondents' affidavits as required by Rule 56(e), they did not initiate or undertake any discovery, and they filed no Rule 56(f) affidavits in opposition to respondents' motions, explaining why they failed to oppose summary judgment as required by the Rule.

After hearing oral argument on September 16, 1977, the District Court granted defendant-respondents' motions, holding in its "Memorandum Order" dated November 23, 1977 that "since plaintiffs' claim is premised upon sales from [retailer] McNamara's to Beckers and from [retailer] Danner to Miotke and not upon any direct sales from the defendants to the plaintiffs, the general rule [in *Illinois Brick*] precludes recovery." (App. A-7 of Petition). In addition, on the basis of respondents' uncontroverted affidavits establishing that there were no cost-plus contracts involved in any of the sales transactions and that neither retailer McNamara nor retailer Danner was owned or controlled by any respondent or by petitioners, the District Court rejected petitioners' argument that they came within one of the narrow "exceptions" to the

[2] The moving defendants who also are respondents herein are as follows: Scorpion, Inc.; Yamaha Motor Company Limited; Brunswick Corp.; Massey-Ferguson, Inc.; Bombardier Limited; Coleman Co., Inc.; International Snowmobile Industry Association; Kawasaki Motor Corp. U.S.A.; Deere & Co.; AMF Incorporated; U.S. Suzuki Motor Corporation, Limited; Outboard Marine Corp.; Arctic Enterprises, Inc.; Textron, Inc. The District Court found that there had been no effective service upon three additional defendants, Boa-Ski Limited; Skiroule, Lt'ee; and Sno-Jet, Inc., and the action was dismissed without prejudice as to them. The final defendant, American Honda Motor Co., Inc. was dismissed from the action prior to the filing of defendants' summary judgment motion.

general rule barring recovery by indirect purchasers. Finally, in response to petitioners' unsupported assertion that "only discovery can disclose what type of franchise contracts or other arrangements or activities affected retailers" (C.A. App. 66) [3] so that *Illinois Brick* might not prevent recovery, the District Court ruled that petitioners' contention, in the absence of proper countering or explanatory affidavits "amounts to mere speculation and is insufficient to ward off the granting of summary judgment," and the action was dismissed with prejudice. (App. A-9 of Petition).

Subsequently, on November 28, 1977, petitioners filed a motion to vacate the judgment under Rules 59 and 60, Fed.R.Civ.P., and to amend their complaint or add new parties under Rules 15 and 21, repeating the grounds previously rejected by the lower court and offering to amend their complaint "to plead whatever facts this Court desires. . ." (C.A. App. 111-118). Again pointing out that the uncontroverted facts were that the "persons from whom the named plaintiffs did make direct purchases neither controlled nor were controlled by either the plaintiffs or the defendants" (App. A-12 of Petition), the District Court reaffirmed its ruling that petitioners had failed to raise a "genuine issue of fact" as required by Rule 56, and that petitioners' attempt to distinguish *Illinois Brick* by labelling their cause of action a "resale price maintenance" case was no substitute for it. Finally, the Court rejected petitioners' request to amend the complaint "to plead whatever facts this Court desires" and to

[3] Proceedings below cited in petitioners' Appendix to the Eighth Circuit are cited here as "C.A. App."

add new parties as being neither timely nor appropriate. (App. A-12 of Petition).[4]

On August 21, 1978 the Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of the District Court, holding that, as "indirect purchasers," petitioners were precluded from maintaining their action under the *Illinois Brick* case and that respondents' summary judgment motion properly had been granted. With reference to petitioners' argument that respondents "had controlled the sales practices of the retailers from whom they purchased and had engaged in resale price maintenance," the Court ruled that it was unnecessary to decide whether petitioners' "control" allegation came within any exception to the "indirect purchaser" rule of *Illinois Brick* since petitioners failed in all respects to follow the requirements of Rules 56(e) and (f), Fed.R.Civ.P. (App. A-3 of Petition).

As the Court of Appeals held, once respondents had controverted petitioners' allegations by filing affidavits establishing that they did not control the retailers from whom the snowmobiles had been purchased, it was incumbent upon petitioners to file countering affidavits under Rule 56(e), or failing that, to obtain relief under Rule 56(f) by explaining "by affidavit the reasons why he is unable to present the necessary opposing material. . ."

[4] Petitioners filed two additional motions asking the District Court to vacate its final judgment. Petitioners' motion of December 22, 1977 merely reargued the grounds previously rejected by the lower court, and their third and final motion filed on January 4, 1978 was based on a "memorandum/affidavit" by petitioners' counsel setting forth "new evidence" — several pages from trade publications — having nothing to do with petitioners' status as indirect purchasers, and in no way contradicting the undisputed facts set forth in respondents' affidavits. (C.A. App. 141-43). The District Court denied both motions. (App. A-12 and A-13 of Petition).

(App. A-5 of Petition). Instead, petitioners "merely filed a statement in opposition to appellee's motion for summary judgment," consisting of "argument that appellants' claims were an exception to *Illinois Brick*." Since petitioners "did not file an affidavit setting forth reasons why they were unable effectively to rebut [respondents'] affidavits or to engage in discovery" as required by Rule 56(f), the Court ruled that summary judgment was appropriate. (App. A-5 of Petition).

ARGUMENT

Petitioners' prime contentions in support of their petition for certiorari are all grounded upon essentially the same claim: that petitioners had established, or should have been given the opportunity to establish, the existence of a material factual dispute relating to their contention that their claim somehow constituted an exception to *Illinois Brick*.

Unfortunately for petitioners, as is readily apparent from the proceedings below, they failed to follow the required procedures set forth in Rules 56(e) and (f), Fed.R.Civ.P., for opposing a properly supported summary judgment motion. Repeated rulings by this Court, which have been followed by all lower federal courts, have made it clear in this situation that a party opposing summary judgment cannot rely on mere allegations but must proffer countering evidentiary materials or file an affidavit under Rule 56(f) explaining why he is unable to do so. As both the District Court and the Court of Appeals held, petitioners here did not do either of the required alternatives, and respondents' summary judgment motions were properly granted. In short, this case presents nothing more than an instance of a party failing to comply with well-established procedural requirements under Rule 56. No question of law, procedure or policy warranting ple-

nary consideration by this Court is presented, and the petition should be denied.

I
THE COURTS BELOW CORRECTLY RULED ON THE BASIS OF ILLINOIS BRICK AND THE UNCONTROVERTED FACTS OF RECORD THAT SUMMARY JUDGMENT AGAINST PETITIONERS WAS APPROPRIATE

In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court, following and expanding upon the general rule established in *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968), ruled that indirect purchasers, like petitioners here, were precluded from seeking recovery under Section 4 of the Clayton Act. After *Illinois Brick*, only "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of [Section 4 of the Clayton Act]." 431 U.S. at 729.

The *Illinois Brick* decision controls the present case. As found by both the District Court and the Court of Appeals below, the record is uncontroverted that petitioners purchased the snowmobiles from independent retailer dealers who, as a result of arms-length transactions, had purchased them previously from two distributors (who, in turn, had purchased them from two of the respondent manufacturers). As a matter of law, petitioners are not permitted to seek recovery on the basis that the effects of respondents' alleged acts passed through the chain of distribution and caused injury to them.

Faced with this clear legal bar to their claims, petitioners below, without any factual showing, sought to come within one of the "narrow" exceptions to the ban on

the use of pass-on which, as this Court noted in *Illinois Brick*, "might be permitted." 431 U.S. at 736. Seizing upon the possible exception noted by this Court for a suit by an indirect purchasing customer who owns or controls his supplier (who, in turn, is a direct purchaser from the alleged violator),[5] petitioners seek to turn this proposition on its head by arguing that they also should have an exception since the direct purchasers (retailers McNamara and Danner) allegedly were "controlled" by their suppliers, *i.e.*, respondents herein. While it is far from clear that the possible "customer control" exception in *Illinois Brick* can or should be extended to instances of alleged "supplier control" as urged by petitioners, the Court of Appeals properly ruled that it need not decide this question since petitioners' arguments were based on mere allegations rather than upon properly supported evidentiary material as required by Rule 56(e). None of the assertions which petitioners made below or which are set forth in their petition can overcome this procedural failing.

First. Petitioners' contention that the "indirect purchaser" rule of *Illinois Brick* does not apply to them "as a a matter of law" on the ground that their action is a "resale price maintenance" case is fallacious. As the Court of Appeals recognized, petitioners' assertion that respondents engaged in resale price maintenance is nothing more than an allegation that respondents "controlled the sales practices of the retailers from whom [petitioners] purchased . . ." (App. A-3 of Petition). This is an allegation of fact only, and petitioners' labelling it a matter of law does not and cannot make it so. Since

[5] The language of the "customer control" exception to the indirect purchaser rule in *Illinois Brick* is as follows:

Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. 431 U.S. at 736, n. 16.

respondents' affidavits controverted petitioners' allegation of retailer "control" by respondents, the Court of Appeals correctly held that petitioners could not withstand summary judgment in the absence of proper countering affidavits under Rule 56(e) or a Rule 56(f) affidavit "setting forth reasons why they were unable effectively to rebut [respondents'] affidavits or to engage in discovery." (App. A-5 of Petition).

Second. Petitioners' next assertion that they were denied discovery with respect to the "control or ownership" exception to *Illinois Brick* is equally deficient. On the contrary, petitioners were not prevented from initiating discovery — they simply did not do so. Thus, in the six-month period between the filing of their case in May 1977 and the District Court's granting of summary judgment against them in November 1977, petitioners filed no deposition notices, they made no request for documents and they asked for no information by way of interrogatory. Moreover, contrary to their claim, petitioners never asked for a continuance to institute discovery specifically directed toward controverting respondents' affidavits as required by Rules 56(e) and (f). (App. A-11 of Petition).[6]

In contrast, the vague and belated references to some undefined discovery to which petitioners alluded in the District Court are no substitute for the specific requirements of Rules 56(e) and (f). For example, at the

[6] Indeed, it should be noted that petitioners failed even to mention Rule 56(f) or a "continuance" in the District Court until after summary judgment had been entered against them and after their first motion to vacate the judgment had been filed and answered by respondents. At that point, in a December 12, 1977 letter to the Court, counsel for petitioners simply made mention of 56(f) without specifying what discovery might be needed or what it might accomplish. (C.A. App. 129).

summary judgment hearing on September 16, 1977, counsel for petitioners, acknowledging that respondents' affidavits had demonstrated that the retailers McNamara and Danner were independent dealers and not controlled by respondents, stated only that the affidavits "are very carefully drawn, I believe, I don't know, this awaits discovery, and obviously I would be granted discovery. . ." (C.A. App. 93). The District Court properly characterized these nebulous references as "mere speculation" and "insufficient to ward off the granting of summary judgment." (App. A-8 of Petition).

Finally, petitioners' reference to "hard document evidence," consisting of a single "Sales Slip" from "McNamara's Cycle," in which the retailer refers to itself as an "authorized Yamaha dealer" (App. A-14 of Petition), is to no avail. Even if McNamara were an "authorized Yamaha dealer" this fact would have no probative value on the question of what "control," if any, respondent Yamaha exerted over retailer McNamara. Of equal significance, petitioners at no time explained, by affidavit or otherwise, why they failed to seek discovery from McNamara or from Yamaha or from anyone else.

In short, as the Court of Appeals pointed out, petitioners, "resting upon the allegations set forth in their complaint," failed to rebut respondents' affidavits and did not "engage in or attempt to engage in any discovery." (App. A-3 of Petition). Even in antitrust cases, as this Court has long held, "a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him." *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968).

Third. Petitioners' contention that their inability to file countering evidentiary materials or to engage in discovery need not be explained in a "formal affidavit"

flies in the face of the specific language of Rule 56(f), and is contrary to unanimous decisions of this Court and all lower federal courts. The Court of Appeals below was following these well-established precedents and procedures in holding that Rule 56(f) requires a party to

> state by affidavit the reasons why he is unable to present the necessary opposing material . . . [The] affidavit . . . need not contain evidentiary facts going to the merits of the case; rather, it is merely a sworn statement explaining why these facts cannot yet be presented. C. Wright & Miller, Federal Practice and Procedure §2740 at 722-23 (1973).[7] (App. A-5 of Petition).

This Court has made it clear that petitioners' failure to follow the specific requirements of Rule 56 is fatal to their case. In *Adickes* v. *S.H. Kress and Co.*, 398 U.S. 144 (1970), where a key factual dispute involved the presence or absence of a policeman in defendant's Hattiesburg, Mississippi store in connection with plaintiff's charge of a state-supported conspiracy to violate her civil rights, this Court specified that had defendant submitted a properly supported motion establishing the absence of a policeman, plaintiff could have avoided summary judgment only by "com[ing] forward with either (1) the affidavit of someone who saw the policeman in the store or (2) an affidavit under Rule 56(f) explaining why at that time it was impractical to do so." 398 U.S. at 160. Significantly, this Court went on to recite Professor Moore's admonition on summary judgment that "[i]t has always been perilous for the opposing party neither to proffer any countering

[7] These same commentators have put petitioners' procedural failings even more succinctly in pointing out that Rule 56(f) "will not be liberally applied to aid parties who have been lazy or dilatory. The most obvious indication of lack of diligence is a failure on the part of the nonmovant to present affidavits under either subdivision (e) or (f)" of Rule 56. C. Wright & Miller, Federal Practice and Procedure, §2740 at 725 (1973).

evidentiary materials nor file a 56(f) affidavit." 398 U.S. at 161.

Not surprisingly, the lower federal courts unanimously have ruled that a properly supported summary judgment motion can be defeated only by submitting proper evidentiary materials under Rule 56(e) or by an adequate explanatory affidavit under 56(f). *See, e.g., Oglesby* v. *Terminal Transport Co., Inc.*, 543 F.2d 1111 (5th Cir. 1976); *Mutual Fund Investors* v. *Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *Smith* v. *Saxbe*, 562 F.2d 729 (D.C. Cir. 1977); *King* v. *National Industries Inc.*, 512 F.2d 29 (6th Cir. 1975); *United States* v. *Donlon*, 355 F.Supp. 220 (D.Del. 1973), *aff'd*, 487 F.2d 1395 (3rd Cir. 1973); *Lacey* v. *Lumber Mutual Fire Insurance Co. of Boston*, 554 F.2d 1204 (1st Cir. 1977); *Atlantic States Construction Co.* v. *Robert E. Lee & Co., Inc. of South Carolina*, 406 F.2d 827 (4th Cir. 1969); *Lundeen* v. *Cordner*, 356 F.2d 169 (8th Cir. 1966); *School Board of Okaloosa County* v. *Richardson*, 332 F.Supp. 1236, 1269 (N.D. Fla. 1971).[8]

[8] The two cases cited by petitioners do not support their assertion that "the Eighth Circuit stands in conflict with the Ninth and Fifth Circuits on Rule 56(f) . . ." (Petition at 17). In Hamilton v. Keystone Tankship Corp., 539 F.2d 684 (9th Cir. 1976), the Court did not suggest in any way that a Rule 56(f) affidavit is not required in a case like the present one, but only that no countering facts or affidavits are required "where the movant's papers on their face are clearly insufficient to support a motion for summary judgment . . ." 539 F.2d at 686. The purported conflict between the Court below and Parrish v. Board of Comm'rs of Alabama State Bar, 533 F.2d 942 (5th Cir. 1976), is equally nonexistent. In sharp contrast to the present case, plaintiffs in Parrish made a specific request for documents with an explanation of how such documents would enable them to prove discriminatory practices on the part of the Alabama State Bar. In response, defendants merely entered a general denial of improper conduct, and the Fifth Circuit held that under these circumstances the lower court erred in granting defendants' motion for summary judgment without giving plaintiffs access to the requested documents.

Finally, petitioners' claim that the Eighth Circuit's rulings in this case and in *Willmar Poultry Co.* v. *Morton-Norwich Products Co., Inc.*, 520 F.2d 289 (8th Cir 1975), *cert. denied*, 424 U.S. 815 (1976) have created an "impossible 'Catch Twenty-two' standard" for filing a Rule 56(f) affidavit is simply wrong. In both cases, the Courts below have done no more than to follow the clear requirements of Rule 56.

The lower courts in *Willmar Poultry* ruled only that plaintiffs, unable to counter defendants' showing that the statute of limitations had run, "made no effort to demonstrate what purpose, if any, discovery would accomplish" so as to enable them to raise a genuine issue of fact, and summary judgment was entered accordingly. 520 F.2d at 297. In the present case, petitioners were even more lax in attempting to raise a genuine issue as required under Rule 56, and the Courts below merely ruled that six months was more than ample time for petitioners to initiate discovery or to explain by a Rule 56(f) affidavit why they had not done so.

II
THE OTHER MATTERS RAISED BY PETITIONERS' ALSO RELATE TO ROUTINE PROCEDURAL MATTERS WHICH PROVIDE NO BASIS FOR GRANTING THE WRIT

1. Under their "Third Alternative Question," petitioners assert that the District Court improperly denied their motions under Rules 59(e) and 60(b) to vacate the judgment and, pursuant to Rules 15 and 21, to amend their complaint "to plead whatever facts this Court desires," and to add the two retailers, McNamara and Danner, as "representatives of a defendant retailer class of co-conspirators with their manufacturers." (C.A. App. 113). Petitioners, however, fail to point out that these

motions were not made until after the District Court had granted respondents' summary judgment motions and after the Court had dismissed the case with prejudice. Petitioners made no showing of new factual matters which would have provided some basis for vacating the judgment and amending the complaint, and the District Court properly denied petitioners' motions as being neither "timely nor appropriate." (App. A-12 of Petition). *Willmar Poultry Co.* v. *Morton-Norwich Products, Inc.*, *supra; Kirsch* v. *Barnes*, 157 F.Supp. 671 (N.D. Cal. 1957), *aff'd*, 263 F.2d 692 (9th Cir. 1959).

2. Petitioners' reference to the Eighth Circuit's opinion in *Reiter* v. *Sonotone Corp.*, No. 78-690, certiorari granted, January 8, 1979, has no bearing upon this case, and the present petition should not, as petitioners propose, be held "in abeyance" pending decision by this Court in *Reiter*. The sole issue in the *Reiter* case is whether plaintiff-consumers, alleging no injury of a commercial or competitive nature, are injured in their "property" under Section 4 of the Clayton Act. This Court's decision in *Reiter* can have no effect upon petitioners' failure in this case to comply with the requirements of Rules 56(e) and (f).

Similarly, what petitioners refer to as a "gross oversight" by the Court of Appeals in allegedly failing to recognize that their earlier decision in *Reiter* did not cover injunctive relief under Section 16 of the Clayton Act (15 U.S.C. §26), has nothing to do with petitioners' procedural failings under Rule 56. (Petition at 19). The same holds true for petitioners' assertion that Section 16 is a "broader provision" than Section 4 of the Clayton Act, since, once again, they stood by silently in the District Court without raising this issue as required by Rules 56(e) and (f).

In sum, petitioners' lack of diligence in complying with Rule 56 makes these contentions as well as all others set forth in their petition irrelevant and immaterial, and no issue is presented which merits review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: March 9, 1979

Respectfully submitted,

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